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In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH A. CIRILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, pp. 7-10) is reported at 251 F. 2d 638.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1957. A petition for rehearing was denied on February 18, 1958. The petition for a writ of certiorari was filed on March 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

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[1] Petitioner has failed to comply with Rule 23(1)(i) of this Court, which requires that a copy of the opinion of the Court of Appeals be appended to the petition. For the Court's convenience we reproduce that opinion as an appendix hereto.

QUESTION PRESENTED

Whether the evidence is sufficient to support the verdict.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) *Failure to file returns, submit information, or pay tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or, both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(a).

Internal Revenue Code of 1954:

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a

return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7203.)

STATEMENT

On February 20, 1957, an information was filed against petitioner in the United States District Court for the Western District of Pennsylvania, alleging that he had willfully failed to file individual income tax returns for the years 1953 and 1954, in violation of Section 145(a) of the Internal Revenue Code of 1939 and Section 7203 of the Internal Revenue Code of 1954. (R. 1a.)[2] After a jury trial on June 10 and 11, 1957, petitioner was found guilty on both counts, whereupon he was sentenced to concurrent 90-day prison terms and fined $500 on each of the two counts. (R. 2a.)

Although petitioner challenges the sufficiency of the evidence to support the verdict, he has not furnished this Court with any testimony or exhibits whatever. In these circumstances, we assume that petitioner does

[2] The record certified to this Court consists of (1) the appendix to appellant's brief in the Court below (numbered from 1a to 9a); (2) the appendix to the Government's brief in the court below (numbered from 1b to 6b); and (3) the proceedings in the Court of Appeals (unnumbered).

not dispute the facts as stated by the Court of Appeals (*infra*, p. 9):

> The evidence showed that the defendant, who was a lawyer, received taxable income of more than $10,000 in each of the years in question. He was engaged in the general practice of law and also received compensation as Assistant Solicitor of Allegheny County. In each year the county withheld an amount representing estimated tax from defendant's salary and thereafter sent him a standard W-2 Form. On its face this form showed the amount withheld and instructed the taxpayer to file a return, attaching the W-2 Form to it. The defense offered no evidence, standing on its claim that the government's case was insufficient to justify a conviction.
>
> * * * The defendant was revealed as a man who in two successive years received a substantial amount of taxable income from which no tax had been withheld and of which the government was likely to be uninformed unless he filed a tax return. * * *

ARGUMENT

There is no merit in petitioner's sole contention, i.e., that the evidence was insufficient to support the jury's verdict of guilty. Petitioner concedes that his income in each year was such that he was required to file tax returns, and that he failed to file them, but argues that the Government offered no proof that such failure was willful.

Willfulness, of course, need not be proved by direct evidence, but may be inferred from all the circumstances of the case. Here there was solid support for

such an inference. Petitioner was an attorney. In 1953, and again in 1954, he received over $10,000 of taxable income, only a portion of which was subject to the withholding tax. For 1953, and again for 1954, petitioner failed to file returns, though he was required to do so if his gross income exceeded $600. (Section 51 of the Internal Revenue Code of 1939; Section 6012 (a)(1) of the Internal Revenue Code of 1954.) It was shown that with respect to that portion of petitioner's income received as salary for his work as Assistant Solicitor of Allegheny County, the County furnished him each year with a W-2 Form which expressly instructed him to file an income tax return and to attach the W-2 Form to it. The jury was entitled to infer that these two successive violations were not produced by ignorance of his obligations under the federal tax laws, but were the result (in the language of the court's charge to the jury) of "the deliberate intention not to file a return which the defendant knew ought to be filed, so that the government would not know the extent of his liability." (R. 4a.) The Government proved that there was a substantial tax owing with respect to each year, although it was not required to do so. See *Spies* v. *United States*, 317 U.S. 492, 498-499.[3]

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[3] In finding the evidence sufficient, the Court of Appeals stated (Appendix, *infra*, p. 9): "The government's evidence, submitted to the jury without refutation or rebuttal, was sufficient to sustain a guilty verdict." There is no merit in the argument (Pet. 4-5), which appears to be based wholly on the above sentence, that the Court of Appeals should not have considered the Government's evidence "in the light that it was unrefuted and the failure to file was unexplained." An appellate court, weighing the sufficiency of the evidence in a criminal case, need not shut its eyes to the absence of explanation from the defense. *Holland* v. *United States*, 348 U.S. 121, 138-139.

Petitioner errs in asserting (Pet. 4) a conflict between this case and the cases of *Felton* v. *United States*, 96 U. S. 699, and *United States* v. *Murdock*, 290 U. S. 389. In *Felton* the evidence showed plainly that the defendants had no knowledge of the act of omission there in question; hence their neglect to perform the statutory duty could not have been willful. See 96 U. S. at 702-703. In *Murdock* the trial court erroneously refused to submit to the jury the defense contention that a refusal to supply information to Treasury agents was not willful because the defendant had believed in good faith that he had a right to assert his privilege against self-incrimination. *United States* v. *Kahriger*, 210 F. 2d 565 (C. A. 3d), the only other case relied upon by petitioner, also holds that a refusal on such grounds was not willful.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

APRIL, 1958.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,302

UNITED STATES OF AMERICA,

v.

JOSEPH A. CIRILLO, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued Nov. 22, 1957

Before BIGGS, *Chief Judge;* and GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 30, 1957)

HASTIE, *Circuit Judge.*

The appellant has been convicted of the misdemeanors of willfully failing to file income tax returns for the years 1953 and 1954; in violation of § 145 (a) of the Internal Revenue Code of 1939, 53 STAT. 62, 26 U.S.C. § 145 (a) for the year 1953, and in violation of § 7203 of the Internal Revenue Code of 1954, 68 A STAT. 851, 26 U.S.C. § 7203, for the year 1954. For these offenses jail sentences of ninety days, to run concurrently, and fines of $500. have been imposed.

The only points which require discussion are those which appellant raises with reference to criminal in-

tent. The statute provides that "any person . . . required by law . . . to make a return . . . who willfully fails to . . . make such return . . . shall . . . be guilty of a misdemeanor. . . ." Was there a proper charge and was there adequate proof of the "willfulness" which is an essential element of criminal failure to file income tax returns?

In explaining to the jury the state of mind which had to be shown to justify a guilty verdict in this case, the court below defined "willful" as "voluntary, purposeful, deliberate, intentional as distinguished from accidental, inadvertent or negligent." The court added that "willful" had the connotation of "done with a bad purpose or done without justifiable excuse, or done stubbornly or obstinately or perversely, or with bad motives." To this the court added, "that the only bad purpose or motive which it is necessary for the government to prove in this case is the deliberate intention not to file a return which the defendant knew ought to be filed so that the government would not know the extent of his liability." Counsel for the defendant objected that the court had not made clear the necessity of showing "evil intent and bad purpose". The court then added this admonition: "don't take just one phrase of what I said about willfulness; take it all, everything together, and if you find that he knowingly, willfully, failed to make a return with criminal intent to avoid the law, if you find that beyond a reasonable doubt, you may find him guilty, otherwise you will acquit him."

We find nothing erroneous or confusing in this instruction. *Cf. United States v. Litman*, 3d Cir. 1957, 246 F.2d 206; *Haskell v. United States*, 10th Cir. 1957, 241 F.2d 790; *Yarborough v. United States*, 4th Cir. 1956, 230 F.2d 56; and see the explanation of the meaning of willfulness in relation to the felony of tax evasion under § 145 (b) by Judge Goodrich for this court in

United States v. Martell, 3d Cir. 1952, 199 F.2d 670, 672. Where the offense charged is the misdemeanor of willfully failing to file a tax return, the phrase "bad purpose" used as a characterization of "willfulness" serves merely to distinguish situations involving bona fide misconceptions of what is required from those where the failure to file has been attended by knowledge of the legal obligation and purpose to prevent the government from getting that which it lawfully requires.

We next consider the sufficiency of the proof. The evidence showed that the defendant, who was a lawyer, received taxable income of more than $10,000 in each of the years in question. He was engaged in the general practice of law and also received compensation as Assistant Solicitor of Allegheny County. In each year the county withheld an amount representing estimated tax from defendant's salary and thereafter sent him a standard W-2 Form. On its face this form showed the amount withheld and instructed the taxpayer to file a return, attaching the W-2 Form to it. The defense offered no evidence, standing on its claim that the government's case was insufficient to justify a conviction.

The government's evidence, submitted to the jury without refutation or rebuttal, was sufficient to sustain a guilty verdict. The defendant was revealed as a man who in two successive years received a substantial amount of taxable income from which no tax had been withheld and of which the government was likely to be uninformed unless he filed a tax return. The jury was entitled to reason that a member of the bar, in the nature of his profession, has some general understanding that the United States requires persons who earn substantial income to file periodic income tax returns. And quite apart from that inference, the jury was entitled to view the W-2 Forms as reminders of the

duty to file received shortly before or during the period within which filing was required. That is enough to justify a finding that the unexplained failure to file returns for 1953 and 1954 was "willful" within the meaning of the statute.

The judgment will be affirmed.